STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 8, 2005
v	No. 249864 Oakland Circuit Court
DEMAR LEWIS GARVIN, Defendant-Appellant.	LC No. 01-181022-FH

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for possession with intent to deliver between 50 and 225 grams of cocaine, second offense, MCL 333.7401(2)(a)(iii), possession with intent to deliver under fifty grams of heroin, MCL 333.7401(2)(a)(iv), and two counts of possession of a firearm when committing a felony, MCL 750.227b. Defendant pleaded guilty to being a felon in possession of a firearm, MCL 750.224f. He was sentenced as a third habitual offender to serve consecutive sentences of ten to forty years in prison for the possession with intent to deliver 50 to 225 grams of cocaine conviction, 2 ½ to 40 years in prison for the possession with intent to deliver less that fifty grams of heroin conviction, two years in prison for each of the felony-firearms convictions, and two to ten years in prison for the felon in possession of a firearm conviction. We affirm.

I. FACTS

On February 21, 2001, Pontiac police officers arrived at 332 Seward, to execute a search warrant on defendant's home. Officers forcefully entered the house after receiving no response, and immediately saw defendant and a small child in a first-floor bedroom. Officers noticed a forty-five caliber revolver in plain view on the nightstand and $7,467 in defendant's pants pocket. Officers also found a scotchguard bottle with a false bottom containing four packages of heroin, each in lottery folded $10 packages. Officers also found a digital scale in the dishwasher, which a field test revealed contained cocaine residue. Further investigation by the officers revealed a forty-five caliber pistol and thirty caliber rifle in a pair of sweatpants located on the bedroom floor.

During trial, there was testimony about defendant's prior bad acts. Five officers, two of whom were involved in the 2001 investigation, testified that on June 11, 1998, they executed a search warrant on a home located at 605 Seward, in the city of Pontiac. Again, after forcefully

entering the house, the officers found the only occupants to be defendant and a small child. Officers also found two handguns and a sock containing three baggies of heroin, each of which contained an eighth of an ounce of heroin. Officers also found over $21,000 in cash under a bed in a shoe box. The testimony given by the officers during defendant's 2003 trial regarding the 1998 search is the gravamen of this appeal.

II. ADMISSIBILITY OF EVIDENCE

Defendant's first issue on appeal is that the trial court abused its discretion by admitting similar acts evidence regarding a 1998 police search of defendant's then home, which uncovered drugs, guns and packaging paraphernalia. We disagree.

A. Standard of Review

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Drohan*, 264ich App 77, 2004; ___ NW2d ___.(2004) "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *Id.*, quoting *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

B. Analysis

Use of bad acts as evidence is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's past conduct. *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002). To be admissible under MRE 404(b), bad acts evidence generally must satisfy four requirements: (1) the prosecutor must offer the prior bad acts evidence for something other than character or propensity; (2) the evidence must be relevant, MRE 402; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice, MRE 403; and (4) the trial court, upon request, may provide a limiting instruction, MRE 105. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The prosecution bears the initial burden of establishing that the evidence is relevant within an exception to its general exclusion. MRE 404(b)(1); *Knox, supra* at 509.

The evidence was properly admitted under the standard set out in *VanderVliet.* First, the prosecution sought to admit the evidence for a proper purpose, to show defendant's knowledge of the presence of drugs and guns in him home and intent to deliver the drugs. Second, the evidence was relevant to a material issue because when a defendant pleads not guilty of the offense charged, all elements that comprise the offense are at issue. *People v Martzke*, 251 Mich App 282, 293; 651 NW2d 490 (2002). For defendant to be found guilty of possession with intent to deliver, the prosecutor must establish beyond a reasonable doubt that that the defendant knowingly possessed a controlled substance and that the defendant intended to deliver the substance. *People v Marion*, 250 Mich App 446; 647 NW2d 521 (2002); CJI 12.3. Third, the probative value of the evidence was not substantially outweighed by any unfair prejudice. The evidence had strong probative value because it tended to establish defendant's knowledge and intent. Finally, because this was a bench trial, it is presumed that the judge understood the

proper purposes for which the evidence could be used. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Defendant argues that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. He contends that the 1998 incident and the current offense were not similar enough to meet the standard for admission of MRE 404(b) evidence. This argument is unpersuasive. The charged offense and the 1998 incident share common features beyond mere commission of a controlled substances offense. See *People v Sabin (On Remand)*, 463 Mich 43, 66; 614 NW2d 888 (2000). In the 1998 incident, officers found heroin concealed in a sock on defendant's bedroom floor, $21,000 in cash under the bed in the bedroom, two loaded guns, scales, and cutting agent. In the instant offense, officers found drugs concealed in a Scotchguard can, loaded guns in defendant's bedroom, scales, cutting agent, and over $7,000 in cash. The 1998 incident and the charged offense share sufficient common features to infer defendant's knowledge that drugs and guns were present in his home and his intent to deliver those drugs.

III. SENTENCING

Defendant next claims that he should have been sentenced under the amended sentencing provisions that were in effect at the time of his sentencing, but not in effect at the time of the crime. We disagree.

A. Standard of Review

The determination whether a statute should be applied retroactively is a legal issue that is review de novo. *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004). This Court's concern is to ascertain and give effect to the legislative intent expressed by the plain language of the statute. *Id.* If the plain meaning of the statute's language is clear, judicial construction is not required or permitted. *Id.*

B. Analysis

On March 1, 2003, amended sentencing provisions of MCL 333.7401 became effective. The old language of MCL 333.7401(3) provided that sentences "*shall* be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." The new provision states that sentences "*may* be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." MCL 333.7401, as amended by 2002 PA 665 (emphasis added). The issue here is whether the Legislature intended to apply the amended sentencing provisions retroactively.

Implementation of the amended sentencing provisions under MCL 333.7401 was conditioned on passage of two companion sentencing provisions, 2002 PA 666 and 2002 PA 670, which amended, respectively, MCL 769.34(2) and MCL 791.234(11-13). 2002 PA 666 deals with the applicability of the sentencing guidelines and directs the trial court to impose the minimum sentence within the appropriate sentence range under the sentencing guidelines in effect on the date of the offense. MCL 769.34(2), as amended by 2002 PA 666. 2002 PA 670 establishes early parole opportunities for people convicted of drug offenses before March 1, 2003, the date that the amendment went into effect. MCL 791.234 (11-13), as amended by 2002

PA 670. Because these statutes all relate to the same subject matter, they are analyzed in pari materia. *People v Doxey*, 263 Mich App 115, 2004; 687 NW2d 360.

"Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Id.*, quoting *Tobin v Providence Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001). There is no language in the statutes indicating that the Legislature intended that discretion regarding the imposition of consecutive sentences should apply to defendants who committed their offenses before March 1, 2003. Indeed, the plain language of MCL 791.234(11-13) specifically provides that individuals convicted of violating MCL 333.7401(2)(a)(iii) or (2)(a)(iv) "before the effective date of the amendatory act" may become eligible for parole earlier than under the old law. It is plain that the Legislature has specifically provided relief for individuals who were convicted before the amended sentencing provisions became effective. The Legislature declined to specifically apply the amended sentencing provisions of MCL 333.7401 retroactively. We will not ignore the plain language of the statute in order to apply it retroactively.

In *Doxey, supra,* this Court decided an almost identical issue. In that case, the crime was committed and the defendant pleaded guilty before MCL 333.7401, as amended by 2002 PA 665, went into effect, but, as here, sentencing took place after March 1, 2003. *Id.* at slip op, p 1. The trial court sentenced the defendant under the amended provision, and the prosecution appealed. This Court found that the Legislature did not intend to apply the amended sentencing provisions retroactively and remanded for resentencing under the previous incarnation of MCL 333.7401. *Id.* at slip op, p 5.

Defendant relies on *People v Schultz,* 435 Mich 517; 460 NW2d 505 (1990), where our Supreme Court decided that the defendant was entitled to be resentenced under an amended sentencing provision of MCL 333.7401(2)(a)(iii). In *Doxey,* this Court stated that *Schultz* is inapplicable under the instant circumstances for two reasons. First, *Schultz* was a case of simply applying the ameliorative effects of a new, identical statute. However, the act at issue here, MCL 333.7401, as amended by 2002 PA 665, does not just ameliorate the sentencing provision, but alters the breakdown of the proscribed conduct.[1] Second, *Schultz* can be distinguished because here, unlike *Schultz,* the Legislature clearly intended to apply MCL 333.7401, as amended by 2002 PA 665, prospectively.[2]

[1] The new statute added the new crimes of delivery over one thousand grams, delivery of 450 to 1,000 grams, delivery of 50 to 450 grams, and delivery of less than fifty grams. MCL 333.7410(2)(a)(i-iv), as amended by 2002 PA 665.

[2] Further, unlike the defendant in *Schultz,* defendant is not a young, first-time offender deserving of the ameliorative effect of the legislative amendment. See *Thomas, supra,* 260 Mich App 459 n 3. The trial court noted that defendant was currently serving a term for possession with intent to deliver over 650 grams of cocaine, and, when defendant was arrested, he also possessed loaded guns, a substantial amount of cash, and drug packaging paraphernalia.

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell